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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91186348
Party	Plaintiff Dry Force, Inc.
Correspondence Address	Alan L. Edwards Kunzler & McKenzie 8 East Broadway, Suite 600 Salt Lake City, UT 84111 UNITED STATES docket@kmiplaw.com,aedwards@kmiplaw.com,tyler@kmiplaw.com
Submission	Motion to Compel Discovery
Filer's Name	Tyler R. Goucher
Filer's e-mail	tyler@kmiplaw.com
Signature	/Tyler R. Goucher/
Date	06/19/2009
Attachments	2504.7.2 Motion to Compel and Motion to Extend Discovery and Trial Dates - as filed.pdf ( 39 pages )(1539314 bytes )

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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In the matter of trademark application Serial No. 77/399,957  
For the mark MOBILE DRY FORCE  
Published in the Official Gazette on August 26, 2008

DRY FORCE, INC.;	)	
	)	
	)	
vs.                      Opposer,	)	<b>OPPOSER’S COMBINED MOTION TO COMPEL AND MOTION TO EXTEND DISCOVERY AND TRIAL DATES</b>
	)	
MOBILE AIR, INC.;	)	
	)	
Applicant.	)	Opposition No. 91186348
	)	

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Pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice, Opposer, Dry Force, Inc. (Dry Force) moves the Board for an order compelling the Applicant, Mobile Air, Inc., to respond to Dry Force’s interrogatories and requests for the production of documents without objections.

In addition, Dry Force requests an extension of the discovery period for the limited purpose of allowing Dry Force (but not Mobile Air) time to review the discovery responses as ordered by the Board, and to pursue followup discovery, if necessary. Dry Force also requests that the testimony period be re-set to follow close of discovery.

The order compelling production is appropriate because Mobile Air has failed to respond to Dry Force's interrogatories and document requests. Counsel for Dry Force has

made repeated good faith efforts to resolve the issues with Mobile Air, but such efforts have been unsuccessful.

## **I. BACKGROUND**

On September 11, 2008, Dry Force filed a Notice of Opposition against Mobile Air's application (serial no. 77/399,957) for MOBILE DRY FORCE in International Class 037 for "Drying and dehumidification services for structures, building contents and manufacturing plants that have been damaged or destroyed by water." Dry Force owns the mark for a design incorporating the phrase DRY FORCE (Reg. No. 3,007,106) in International Class 037 for "Restoration services in the field of water removal from floods; floodwater removal services." Dry Force has extensively used and promoted the DRY FORCE mark in the United States since at least as early as January 21, 2003, well prior to the filing date of Mobile Air's application. *See*, Dry Force's Registration Certificate attached hereto as Exhibit A. Dry Force alleges that it has priority of use and that confusion would likely result if Mobile Air's mark is registered. *See*, Not. of Opp. ¶ 12.

On November 3, 2008, the Board issued an order setting the schedule for this matter. Discovery opened on January 2, 2009, and is due to close on July 1, 2009. On April 23, 2009, Dry Force served on Mobile Air Dry Force's response to Mobile Air's Discovery Requests responding to Mobile Air's First Set of Interrogatories and Requests to Produce Documents.

On April 14, 2009, Dry Force served Mobile Air with Dry Force's request for production of documents and with a set of interrogatories (copies of these requests are attached hereto as Exhibits B and C respectively). Mobile Air's responses to Dry Force's discovery requests were due May 14, 2009.

By June 1, 2009, Dry Force still had not received a response to the discovery requests and had not received any communication or requests for an extension of time to produce the requested discovery from Mobile Air. On that date, Tyler R. Goucher, counsel for Dry Force, contacted Mobile Air's attorney to inquire about the delay and to find out when Dry Force could expect a response to the requests. Mobile Air's attorney informed Mr. Goucher that she would look into the delay and get back to him. On June 8, Mr. Goucher again called Mobile Air's attorney about the discovery requests. Mobile Air's attorney was not available so Mr. Goucher left a message. On June 9, 2009 Mr. Goucher called Mobile Air's attorney again and left another message.

On June 10, 2009, Mr. Goucher sent a letter via the United States Postal Service, postage prepaid, to Mobile Air's attorney asking for the outstanding responses by June 15, 2009. *See*, Letter attached hereto as Exhibit D. The Letter indicated that if Dry Force did not receive the requested discovery responses by June 15, 2009, Dry Force would be forced to file a motion to compel. *Id.* The letter also requested Mobile Air's attorney stipulate to an extension to the close of discovery to allow Dry Force time to review the responses and request additional discovery if necessary. The letter was also included as an attachment to an email sent on June 10, 2009. *See*, email, attached hereto as Exhibit E.

On June 15, 2009, Mr. Goucher again called Mobile Air's attorney to determine when Dry Force could expect a response to the discovery requests. Mobile Air's attorney did not answer again so Mr. Goucher left another message. Dry Force still has not received a response to its discovery requests.

## **II. MOTION TO COMPEL**

### **A. Dry Force Has Made a Good Faith Effort to Work With Mobile Air**

In accordance with Trademark Rule 2.120(e), Dry Force submits that it has made a good faith effort to resolve with Mobile Air the issues presented in the motion. Specifically, Dry Force has requested the discovery, offered extensions, asked for information concerning the cause of the delay, and otherwise tried to make good faith efforts to obtain responses without intervention by the Board. Dry Force has actually spoken with Mobile Air's attorney, left messages, sent letters, and followed up with emails. In spite of this, Mobile Air has not responded to Dry Force's discovery requests or even to Dry Force's requests for status updates.

### **B. Mobile Air Forfeited its Right to Object**

The Trademark Trial and Appeal Board Manual of Procedure ("TBMP") provides that a party which fails to respond to discovery interrogatories or document requests during the time allowed therefor, and which is unable to show that its failure was the result of excusable neglect, may be found, upon motion to compel filed by the propounding party, to have forfeited its right to object to discovery on the merits. *See* TBMP §§ 403.03; *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1554 (TTAB 2000).

Mobile Air's discovery responses were due, on or before May 14, 2002.

Accordingly, Dry Force respectfully requests that the Board order Mobile Air to fully respond to Dry Force's interrogatories and request for documents, without objections, within twenty days from the mailing date of the Board's order on this motion.

### **III. MOTION TO EXTEND**

In accordance with Fed. R. Civ. P. 6(b), Dry Force hereby moves the Board for a thirty (30) day extension of the discovery period for the limited purpose of allowing Dry Force (and not Mobile Air) time to review Mobile Air's discovery responses as ordered by the Board, and to pursue follow-up discovery if necessary. Dry Force also requests an extension of the testimony periods.

As detailed above, Dry Force has been diligent during the discovery period. Dry Force served discovery on Mobile Air well before the end of the discovery period, and with sufficient time to propagate additional discovery, if necessary, after reviewing Mobile Air's responses. Mobile Air's refusal to respond over the course of two months, even after Dry Force's repeated attempts to secure responses, has in effect denied Dry Force the opportunity to follow up on its initial discovery requests.

Dry Force does not seek an extension of time for purposes of delay. Dry Force requests that the limited thirty (30) day extension run from the date of service of Mobile Air's discovery responses, as ordered by the Board. However, Dry Force requests that the July 1, 2009 discovery cutoff stand as to Mobile Air, since Mobile Air should not be allowed to benefit from its recalcitrance. Dry Force also requests an extension of the testimony period to follow the re-set discovery period.

### **IV. CONCLUSION**

For the reasons stated above, Dry Force respectfully requests that the Board compel Mobile Air to respond to Dry Force's interrogatories and document discovery requests, without objections, within twenty days from the mailing date of the Board's order. Dry Force also respectfully requests that the Board grant Dry Force an extension of the discovery

period for the limited purpose of allowing Dry Force time to review Mobile Air's discovery responses and to propagate any necessary supplemental discovery requests. Dry Force further requests that the Board also adjust the testimony period accordingly.

RESPECTFULLY SUBMITTED this 19 day of June, 2009.



TYLER R. GOUCHER  
DAVID J MCKENZIE  
Kunzler & McKenzie  
8 East Broadway, Suite 600  
Salt Lake City, UT 84111  
Email: tyler@kmiplaw.com  
Telephone: (801) 994-4646  
Fax: (801) 531-1929  
*Attorneys for Dry Force*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19 day of June 2009, a true and correct copy of the foregoing OPPOSER'S MOTION TO COMPELL AND MOTION TO EXTEND DISCOVERY AND TRIAL DATES was served by the following method(s) on the person(s) indicated below:

<p>DOUGLAS W. SPRINKLE JULIE A. GREENBERG GIFFORD KRASS ET AL. PO BOX 7021 TROY, MI 48007-7021</p>	<p><u>  X  </u> US Mail, Postage Prepaid <u>      </u> Facsimile <u>      </u> Hand-Delivery <u>      </u> Federal Express</p>
--	--

DATED and SIGNED this 19 day of June 2009.

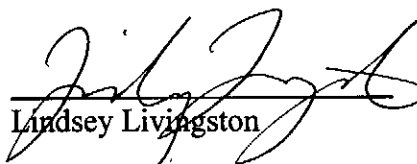
  
Lindsey Livingston



Exhibit “A”

**Int. Cl.: 37**

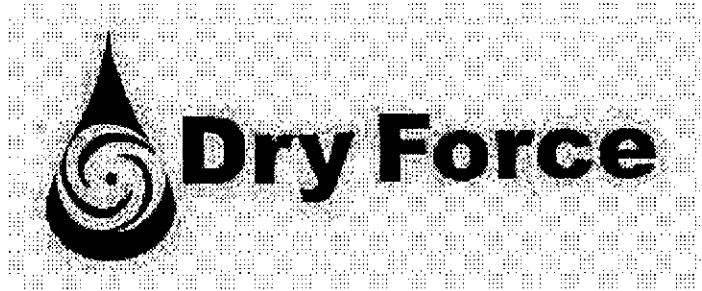
**Prior U.S. Cls.: 100, 103 and 106**

**United States Patent and Trademark Office**

**Reg. No. 3,007,106**

**Registered Oct. 18, 2005**

**SERVICE MARK  
PRINCIPAL REGISTER**



**DRY FORCE, INC. (ARIZONA CORPORATION)  
1819 NORTH ROSEMONT DR., SUITE 103  
MESA, AZ 85205**

**FIRST USE 1-21-2003; IN COMMERCE 1-21-2003.**

**FOR: RESTORATION SERVICES IN THE FIELD  
OF WATER REMOVAL FROM FLOODS; FLOOD-  
WATER REMOVAL SERVICES, IN CLASS 37 (U.S.  
CLS. 100, 103 AND 106).**

**SER. NO. 76-589,849, FILED 4-30-2004.**

**RON FAIRBANKS, EXAMINING ATTORNEY**

## Exhibit “B”

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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In the matter of trademark application Serial No. 77/399,957  
For the mark MOBILE DRY FORCE  
Published in the Official Gazette on August 26, 2008

DRY FORCE, INC.;	)	
	)	
	)	
vs.                      Opposer,	)	<b>OPPOSER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS</b>
	)	
MOBILE AIR, INC.;	)	
	)	
Applicant.	)	Opposition No. 91186348
	)	

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Pursuant to Rule 34 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice (37 C.F.R. § 2.120), Opposer, Dry Force, Inc. ("Opposer"), by and through the undersigned attorneys, serves its First Request For Production of Documents and Things upon Applicant, Mobile Air, Inc. ("Applicant"), and hereby requests that Applicant produce the following documents and things for inspection and copying, along with a written response to this request at the offices of Opposer's counsel: Tyler R. Goucher at Kunzler & McKenzie 8 East Broadway, Suite 600, Salt Lake City, Utah 84111 within thirty (30) days after the service hereof. To the extent permitted by Rule 26(e) of the Federal Rules of Civil Procedure, these requests are to be deemed continuing and the responses thereto are to be supplemented promptly upon Applicant's acquisition of further or additional documents.

## **GENERAL DEFINITIONS AND INSTRUCTIONS**

The following definitions are applicable herein:

A. The terms "Applicant" and "you" or "yours" mean and refer to the Applicant, Mobile Air, Inc., its subsidiaries and any merged or acquired subsidiaries; its predecessors, or controlled, controlling, or affiliated companies; and Applicant's past and present officers, employees, agents, representatives and attorneys, all to the fullest extent the context permits.

B. The term "Opposer" means and refers to the Opposer, Dry Force, Inc., and includes the Opposer herein, its predecessors in business, and their officers, directors, agents, employees, and attorneys, both present and past.

C. The term "Opposer's trademark" and similar terms means and refers to Opposer's trademark, the subject of Registration No. 3,007,106 for the following goods and services: restoration services in the field of water removal from floods and floodwater removal services, registered on Oct. 18, 2005.

D. The term "Applicant's trademark" and similar terms means and refers to Applicant's alleged trademark, the subject of Application Serial No. 77/399,957 for "MOBILE DRY FORCE" for drying and dehumidification services for structures, building contents and manufacturing plants that have been damaged or destroyed by water in Class 037, which the Trademark Office published for opposition in the Official Gazette on August 26, 2008.

E. The term "person" refers to both natural persons and to corporate or other business entities, partnerships, groups, associations, governmental entities, or other organizations.

F. The term "document" is used herein in its customary broad sense as defined in FRCP 34(a)(1), and includes, without being limited to, the original and all copies (carbon, photocopy, photographic, microfilm, or otherwise) of any advertising or promotional material (including, without limitation, art work, copies of drafts thereof, proofs, tear sheets, scripts, storyboards, etc.), brochures, business cards, travel tickets, lodging confirmations,

lists of customers, lists of customer inquiries, rate schedules, letters, correspondence, customer or other complaints, books, journals, ledgers, working papers, invoices, contracts, purchase orders, estimates, reports, memoranda, interoffice communications, records, studies, appraisals, papers, charts, recordings of or memoranda of any conversation (by telephone or otherwise), meeting or conference, or any other writing however produced or reproduced; all other handwritten, typed, printed, or otherwise visually or aurally reproduced materials, whether copies or originals, including, but not limited to, letters, cables, wires, memoranda and interoffice communications; reports, notes, minutes and recordings; drawings, blueprints, sketches, charts, photographs, microfilm records, data compilations and movies; copyrights, copyright registration applications, patents, trademarks, patent applications, trademark applications, assignments, contracts, agreements, licenses and other official documents and legal instruments; published material of any kind; annual reports, reports to shareholders and minutes or reports of meetings of directors or executive boards or committees; advertising or promotional literature and press releases; engineering notebooks and data; and ledgers, bills, orders, books, records, and files that are in the possession, custody or control of Applicant or any of its officers, agents, or employees and/or Applicant's attorneys. The term "document" or "documents" also includes all copies that are not identical with the original.

G. As used herein, "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary in order to bring within the scope of the request all documents and things which might otherwise be construed to be outside its scope.

H. As used herein, the singular shall always include the plural and the present tense shall always include the past tense.

I. The term "thing" as used herein refers to any tangible object other than a document, and includes objects of every kind and nature such as, but not limited to, prototypes, models, specimens, computer disks and tapes, videotapes and audiotapes.

J. Unless otherwise stated in a request, the relevant time period applicable to these requests shall be Applicant's business formation to the date of Applicant's response hereto.

K. Should Applicant withhold any document requested by any of the following requests, Applicant shall, in its written response, describe such document by specifying the following for each such document:

- (1) The date appearing on the document and if no date appears thereon, so state and give the date or approximate date on which the document was prepared;
- (2) The identifying number, letter, or combination thereof, if any, and the significance or meaning of such;
- (3) The general nature or description of the document (*i.e.*, whether it is a letter, memorandum, minutes of a meeting, etc.), and the number of pages of which it consists;
- (4) The name of the person who signed the document and if it was not signed, so state and give the name of the person or persons who prepared it;
- (5) The name of the person to whom the document was addressed and the name of each person, other than such addressee, to whom the document, or a copy thereof, was sent;
- (6) The subject matter to which the document relates; and
- (7) The specific claim relied on for withholding production of the document.

## **REQUESTS FOR PRODUCTION**

1. All documents and things referring or relating to the creation and Applicant's selection of the designation "Mobile Dry Force" or any confusingly similar designation, including correspondence with and memoranda between Applicant and any name consultant, design firm, advertising agency, advertising media, suppliers and printers.
2. All documents and things referring or relating to the adoption and/or use (including Applicant's first use in intrastate and interstate commerce or planned first use in intrastate and interstate commerce) of the designation "Mobile Dry Force" or any confusingly similar designation, including correspondence with and memoranda between Applicant and any name consultant, design firm, advertising agency, advertising media, suppliers and printers.
3. All documents that refer or relate to market studies, focus group studies, polls or surveys conducted by, or caused to be conducted or obtained for or on behalf of Applicant which relate to the designation "Mobile Dry Force" or any confusingly similar designation.
4. All search reports and investigation reports prepared by or for Applicant which refer to, relate to, or comment upon the designation "Mobile Dry Force" or any confusingly similar designation or Applicant's alleged service mark, trademark or trade name or Opposer's trademark.
5. All federal and state service mark applications filed by or on behalf of Applicant for the designation "Mobile Dry Force" or any confusingly similar designation, and all documents referring or relating to any such applications.
6. All documents referring or relating to Applicant's sale of goods or services under the designation the designation "Mobile Dry Force" or any confusingly similar designation.
7. All documents that relate to Applicant's knowledge of Opposer's adoption, use or registration of Opposer's trademark.



8. All documents and things referring or relating to, or comprising any permission given by Applicant to any third party to use an alleged service mark, trademark, or trade name that is similar or identical to the designation "Mobile Dry Force" including all franchise agreements, licenses, and other documents permitting such use, and all documents relating thereto.

9. All documents and things referring or relating to, or comprising any permission received by Applicant from any third party to use a service mark, trademark, or trade name which Applicant considered or considers to be similar or identical to the designation "Mobile Dry Force" or any confusingly similar designation, including all franchise agreements, licenses, and other documents permitting such use, and all documents relating thereto.

10. All documents and things pertaining to use by third parties of an alleged service mark, trademark, or trade name including or consisting of the designation DRY FORCE and or MOBILE DRY FORCE.

11. All documents and things referring or relating to, or comprising any challenges Applicant has ever made to any third party, and any challenges any third party has made to Applicant, concerning the use of any alleged service mark, trademark, or trade name which was considered to conflict with any of Applicant's alleged trademarks or any portions thereof.

12. All documents and things referring or relating to, or comprising any assignment of any trademark rights for Applicant's trademark or use of the designation "Mobile Dry Force" or any confusingly similar designation.

13. All documents and things referring or relating to any court or Patent and Trademark Office action filed by Applicant or filed against Applicant in connection with Applicant's alleged trademark.

14. Specimens of all advertising and promotional documents bearing Applicant's use of the designation "Mobile Dry Force" or any confusingly similar designation, including

brochures, catalogues, circulars, leaflets, direct mail pieces, newspaper and magazine advertisements, commercials, telephone book advertisements, price lists, trade association listings, annual reports, and any other material such as labels, tags, packages, containers, decals, stamps, and name plates used by Applicant, its distributors, or other sellers of its products or services, whether or not such advertising and promotional documents have been used in commerce.

15. Specimens of any pricelists offering for sale Applicant's goods or services using the designation "Mobile Dry Force" or any confusingly similar designation.

16. All documents identifying the publications and broadcast media in which Applicant has advertised, is advertising, or has planned to advertise any of its products or services bearing or sold under the designation "Mobile Dry Force" or any confusingly similar designation.

17. Specimens of each different counter display or other point-of-sale display prepared, printed, or disseminated by or for Applicant in which the designation "Mobile Dry Force" or any confusingly similar designation appears.

18. Copies of all television commercials, radio scripts, and other media advertising not previously requested in which the designation "Mobile Dry Force" or any confusingly similar designation appears or is mentioned.

19. All documents referring or relating to or commenting upon Applicant's advertising or promotional expenditures or Applicant's planned advertising or promotional expenditures for any goods or services under the designation "Mobile Dry Force" or any confusingly similar designation, such advertising or promotional expenditures or planned advertising or promotional expenditures separated by geographic or distribution regions.

20. All documents and things relating or referring to the geographic scope of the advertising, distribution and sale of goods or services bearing or under the designation "Mobile Dry Force" or any confusingly similar designation.

21. All documents referring or relating to, or comprising Applicant's customer lists, prospective customer lists, and mailing lists for products or services offered and sold or those products or services planned to be offered and sold under the designation "Mobile Dry Force" or any confusingly similar designation.
22. All documents referring or relating to or comprising any consumer or market survey, test, or study Applicant has conducted or has caused to be conducted regarding the public's or the trade's recognition of or reaction to the designation "Mobile Dry Force" or any confusingly similar designation.
23. All documents referring or relating to or comprising any consumer or market survey, test, or study Applicant has conducted or has caused to be conducted regarding the public's or the trade's recognition of or reaction to Opposer's trademark.
24. All documents referring or relating to, or comprising any consumer or market survey, test, or study Applicant has conducted or has caused to be conducted regarding any confusion among the public, retailers, or the trade resulting from Applicant's use of the designation "Mobile Dry Force" or any confusingly similar designation.
25. All documents referring or relating to, or comprising Applicant's first notice of Opposer's use and/or application and/or registration of Opposer's trademark.
26. All documents referring or relating to, or comprising any communication or notice to Applicant concerning the possibility that Applicant's use of the designation "Mobile Dry Force", or any portion or variation thereof, might or might not result in confusion or mistake in any industry or among the public, particularly in view of Opposer's use of its trademark.
27. All documents regarding the types and classes of consumers to whom, and the markets and channels of trade in the United States through which Applicant markets or sells goods and services identified by the designation "Mobile Dry Force" or any confusingly similar designation, including without limitation all documents indicating the channels of commerce through which Applicant offers and sells its services or goods to consumers, and

including without limitation all documents indicating the manner in which orders are solicited for Applicant's goods and services marketed or sold under the designation "Mobile Dry Force" or any confusingly similar designation, or by any division, subsidiary, or related company.

28. All documents and things referring or relating to any modification of the designation "Mobile Dry Force" by Applicant since the first use thereof, including all documents relating to the reason such modification was made.

29. All documents and things referring or relating to, or comprising statements, inquiries, comments, or other communications by or from Applicant's customers, distributors, suppliers, or others, relating to the similarity of the designation "Mobile Dry Force" or any confusingly similar designation to Opposer's trademark or evidencing any confusion, suspicion, belief, or doubt on the part of said third parties as to the relationship between either or both of the Applicant and Opposer or their respective products or services, including any misdirected complaints or inquiries.

30. All documents referring or relating to or comprising any communication, oral or written, received by Applicant from any person which suggests, implies, or infers any connection or association with Opposer or which inquires as to whether there is or may be such a connection or association.

31. All documents referring or relating to or evidencing or comprising any instance or occurrence of actual confusion on the part of any person due to Applicant's use of the designation "Mobile Dry Force" or any confusingly similar designation and Opposer's use of Opposer's trademarks or trade names.

32. All documents referring or relating to or comprising any opinion from counsel, whether or not such counsel was employed by Applicant, concerning Applicant's rights to use the designation "Mobile Dry Force" or any confusingly similar designation, including without limitation all documents identifying the date of any such opinion and the attorney

rendering the opinion, or discussing any action Applicant may have taken, or considered taking, in reliance upon said opinion.

33. All documents referring or relating to or commenting upon Applicant's development, manufacture, offering for sale, sale, and distribution of any goods or services with which the designation "Mobile Dry Force" or any confusingly similar designation has been used.

34. All documents referring or relating to, or comprising, any analyses, studies, or reports relating to the sales or prospective sales of Applicant's goods or services under the designation "Mobile Dry Force" or any confusingly similar designation, including but not limited to business plans, marketing plans, development plans, financial plans, and budgetary plans.

35. All documents referring or relating to, or comprising, any plan Applicant has to expand the type of goods or services it offers for sale under the designation "Mobile Dry Force" or any confusingly similar designation.

36. All documents referring or relating to or comprising or commenting on Applicant's incorporation, corporate name reservations, qualifications to do business, trade name registrations and assumed name recordings for Applicant and any of its divisions, subsidiaries, or related businesses, referring or relating to the use of the designation "Mobile Dry Force" or any confusingly similar designation.

37. All documents and things referring or relating to the proportion of Applicant's products or services marketed and sold under the designation "Mobile Dry Force" or any confusingly similar designation.

38. All documents regarding Applicant's policy with respect to retention of documents, including business records.

39. All documents referring or relating to or evidencing or comprising any inquiry, investigation, or survey conducted by or on behalf of Applicant regarding any issues involved in this opposition proceeding.
40. All statements or opinions of any expert retained by Applicant or any person acting for or on behalf of Applicant regarding any of the issues involved in this opposition proceeding.
41. All documents, other than those produced in response to any of the foregoing requests, identified by Applicant in its responses to Opposer's First Set of Interrogatories.
42. All documents, other than those produced in response to any of the foregoing requests, upon which Applicant intends to rely in connection with this proceeding.

RESPECTFULLY SUBMITTED this 4 day of April, 2009.



TYLER R. GOUCHER  
DAVID J MCKENZIE  
Kunzler & McKenzie  
8 East Broadway, Suite 600  
Salt Lake City, UT 84111  
Email: tyler@kmiplaw.com  
Telephone: (801) 994-4646  
Fax: (801) 531-1929  
*Attorneys for Applicant*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14 day of April 2009, a true and correct copy of the foregoing  
OPPOSER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS  
was served by the following method(s) on the person(s) indicated below:

<p>DOUGLAS W. SPRINKLE JULIE A. GREENBERG GIFFORD KRASS ET AL. PO BOX 7021 TROY, MI 48007-7021</p>	<p><input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Federal Express</p>
--	--

DATED and SIGNED this 14 day of April 2009.

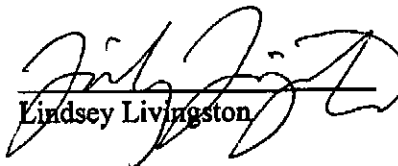
  
Lindsey Livingston

Exhibit “C”



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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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In the matter of trademark application Serial No. 77/399,957  
For the mark MOBILE DRY FORCE  
Published in the Official Gazette on August 26, 2008

DRY FORCE, INC.;	)	
	)	
vs.                      Opposer,	)	<b>OPPOSER'S FIRST SET OF INTERROGATORIES</b>
	)	
MOBILE AIR, INC.;	)	
	)	
Applicant.	)	Opposition No. 91186348
	)	

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Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rule 2.120 of the Trademark Rules of Practice (37 C.F.R. § 2.120), Opposer, Dry Force, Inc. ("Opposer"), by and through the undersigned attorneys, serves its First Set of Interrogatories upon Applicant Mobile Air, Inc. ("Applicant"), to be answered fully in writing under oath. A copy of the answer shall be served upon Opposer's counsel: Tyler R. Goucher at Kunzler & McKenzie 8 East Broadway, Suite 600, Salt Lake City, Utah 84111 within thirty (30) days after the service hereof. To the extent permitted by Rule 26(e) of the Federal Rules of Civil Procedure, these interrogatories are to be deemed continuing and the answers hereto are to be supplemented promptly upon Applicant's acquisition of further or additional information.

*General Definitions and Instructions*

All interrogatories are to be answered on the basis of Applicant's knowledge or information and belief, including that of its officers, employees, directors, or agents having

such knowledge. If any answer is given on information and belief, such fact should be stated in the answer.

If any information called for in any interrogatory is being withheld on the grounds that it is subject to the attorney-client privilege or any other privilege, Applicant is hereby directed to state with respect to such interrogatory that the information is being withheld and state the alleged ground of privilege.

The following definitions are applicable herein:

- A. The terms "Applicant" and "you" or "yours" mean and refer to the Applicant, Mobile Air, Inc., its subsidiaries and any merged or acquired subsidiaries; its predecessors, or controlled, controlling, or affiliated companies; and Applicant's past and present officers, employees, agents, representatives, and attorneys, all to the fullest extent the context permits.
- B. The term "Opposer" means and refers to the Opposer, Dry Force, Inc., and includes the Opposer herein, its predecessors in business, and their officers, directors, agents, employees, and attorneys, both present and past.
- C. The term "Applicant's trademark" and similar terms means and refers to Applicant's alleged trademark, the subject of Application Serial No. 77/399,957 for "MOBILE DRY FORCE" for drying and dehumidification services for structures, building contents and manufacturing plants that have been damaged or destroyed by water in Class 037, which the Trademark Office published for opposition in the Official Gazette on August 26, 2008.
- D. The term "Opposer's trademark" and similar terms means and refers to Opposer's trademark Registration No. 3,007,106 for the following goods and services: restoration services in the field of water removal from floods and floodwater removal services, registered on Oct. 18, 2005.
- E. The term "person" refers to both natural persons and to corporate or other business

entities, partnerships, groups, associations, governmental entities, or other organizations.

F. The term "document" is used herein in its customary broad sense as defined in FRCP 34(a)(1), and includes, without being limited to, the original and all copies (carbon, photocopy, photographic, microfilm, or otherwise) of any advertising or promotional material (including, without limitation, art work, copies of drafts thereof, proofs, tear sheets, scripts, storyboards, etc.), brochures, business cards, travel tickets, lodging confirmations, lists of customers, lists of customer inquiries, rate schedules, letters, correspondence, customer or other complaints, books, journals, ledgers, working papers, invoices, contracts, purchase orders, estimates, reports, memoranda, interoffice communications, records, studies, appraisals, papers, charts, recordings of or memoranda of any conversation (by telephone or otherwise), meeting or conference, or any other writing however produced or reproduced; all other handwritten, typed, printed, or otherwise visually or aurally reproduced materials, whether copies or originals, including, but not limited to, letters, cables, wires, memoranda, and interoffice communications; reports, notes, minutes, and recordings; drawings, blueprints, sketches, charts, photographs, microfilm records, data compilations, and movies; copyrights, copyright registration applications, patents, trademarks, patent applications, trademark applications, assignments, contracts, agreements, licenses, and other official documents and legal instruments; published material of any kind; annual reports, reports to shareholders and minutes or reports of meetings of directors or executive boards or committees; advertising or promotional literature and press releases; engineering notebooks and data; and ledgers, bills, orders, books, records, and files that are in the possession, custody or control of Applicant or any of its officers, agents, or employees and/or Applicant's attorneys. The term "document" or "documents" also includes all copies that are not identical with the original.

G. The term "identify" as used herein means:

(a) in the case of a natural person, to state for each person his or her:

(i) full name;

(ii) present residence address and telephone number;

- (iii) present business address and telephone number;
- (iv) present position, business affiliation, and job description; and
- (v) if any of the information set forth in (i)-(iv) is unknown, so state and set forth the corresponding last known such information;

(b) in the case of a corporation or other business entity, to state for each corporation or business entity:

- (i) its full name;
- (ii) its legal form (*i.e.*, corporation, partnership, etc.) and state of incorporation or legal formation;
- (iii) its address and principal place of business;
- (iv) the identity of officers or other persons having knowledge of the matter with respect to which the corporation or entity is named; and
- (v) the connection to Applicant's response; and

(c) in the case of a document, to state for each document:

- (i) the identity of the person(s) originating and preparing it and the sender;
- (ii) its general type (*e.g.*, letter, memo, report, invoice, etc.), title, identifying number and the general nature of its subject matter;
- (iii) the identity of the addressees and distributees, if any;
- (iv) its date of preparation;
- (v) its date and manner of transmission, distribution and publication, if any;
- (vi) the location of each copy (including title, index number and location of the file in which it is kept or from which it was removed) and the identity of the present custodian or persons responsible for its filing or other disposition; and
- (vii) the identity of persons who can authenticate or identify it.

H. As used herein, "and" as well as "or" shall be construed either disjunctively or conjunctively as necessary in order to bring within the scope of the request all documents

and things which might otherwise be construed to be outside its scope.

I. As used herein, the singular shall always include the plural and the present tense shall always include the past tense.

J. The term "thing" as used herein refers to any tangible object other than a document, and includes objects of every kind and nature such as, but not limited to, prototypes, models, specimens, computer disks and tapes, videotapes and audiotapes.

K. Unless otherwise stated in an interrogatory, the relevant time period applicable to these interrogatories shall be from the date of Applicant's business formation to the date of Applicant's response hereto.

## **Interrogatories**

1. Identify each officer and managing agent of Applicant, giving each officer's and managing agent's name, address, title and duties with respect to Applicant.
2. State the date Applicant was incorporated and the States in which Applicant is qualified or licensed to do business.
3. Identify each predecessor, parent, subsidiary, and affiliated company of Applicant.
4. Describe in detail the business conducted by Applicant since its formation.
5. Identify and describe all the goods or services for which Applicant has used the designation "Mobile Dry Force" or any confusingly similar designation, and for each, supply the date of first use of the designation "Mobile Dry Force" or any confusingly similar designation on the goods or services; the geographic areas in which the goods or services have been marketed and distributed; the individuals, retail stores, or other purchasers to whom the goods or services were sold; and the last date on which said goods or services were marketed or sold, if the designation "Mobile Dry Force" or any confusingly similar designation has not yet been used on goods or services, identify and describe all goods or services for which Applicant anticipates using the designation "Mobile Dry Force" or any confusingly similar designation, and for each, supply the anticipated date of first use of the designation "Mobile Dry Force" or any confusingly similar designation on the goods or services; the geographic areas in which the goods or services will be marketed and distributed; and the individuals, retail stores, or other purchasers to whom the goods or services will be marketed and distributed.
6. Set forth the dates on which Applicant decided to adopt and, if currently in use, the dates on which Applicant first used the designation "Mobile Dry Force" or any confusingly similar designation.

7. Describe the circumstances and method by which Applicant selected and, if currently in use, the circumstances and method by which Applicant first used the designation "Mobile Dry Force" or any confusingly similar designation for each type of goods or services for which it is used.
8. State whether any searches or investigations were conducted by Applicant or any person on its behalf (including its attorneys) to determine whether the designation "Mobile Dry Force" was available as a trademark, trade name or service mark and, if so, identify each such search or investigation.
9. Identify all federal and state trademark applications filed by or on behalf of Applicant for the designation "Mobile Dry Force" or any confusingly similar designation and any variants thereof.
10. State why Applicant selected the term "Mobile Dry Force" as an identifier for each product and/or services specified in International Class 037 of application Serial No. 77/399,957.
11. Identify each person who was responsible for selecting the term "Mobile Dry Force" as a service mark, a trademark or both.
12. State Applicant's annual expenditures since first using the designation "Mobile Dry Force" or any confusingly similar designation for advertising and promoting Applicant's goods and services under the designation "Mobile Dry Force" or any confusingly similar designation, if the designation "Mobile Dry Force" or any confusingly similar designation has not yet been used on goods or services, state Applicants planned annual expenditures for advertising and promoting Applicant's goods and services under the designation "Mobile Dry Force" or any confusingly similar designation.
13. Identify each different label, hangtag, wrapper, container, advertisement, brochure, and the like, used by Applicant which contains or bears the designation "Mobile Dry Force" or any confusingly similar designation.

14. Identify any pricelists offering for sale Applicant's goods or services using the designation "Mobile Dry Force" or any confusingly similar designation.
15. Identify each person employed by Applicant and each outside agent or agency retained by Applicant who has been or now is responsible for (a) planning and/or implementing any marketing, advertising and promotion, and (b) bookkeeping and accounting with respect to any goods or services offered for sale or sold under the designation "Mobile Dry Force" or any confusingly similar designation.
16. State whether Applicant or any person acting for or on its behalf has ever granted to any person any authorization or license to use the designation "Mobile Dry Force" or any confusingly similar designation and, if so, identify to whom such authorization or license was granted; the date it was granted; the terms and conditions of such authorization or license, including the duration of permitted use; and the business, goods, and services for which the authorization or license was granted.
17. Identify the media and channels of trade in the United States through which Applicant has advertised or promoted its goods or services under the designation "Mobile Dry Force" or any confusingly similar designation.
18. List all geographical areas (by city and state) in which Applicant sells each product and/or service specified in International Class 037 of application Serial No. 77/399,957 under the designation "Mobile Dry Force" or confusingly similar designation and the dates thereof.
19. For each good or service bearing or sold under the designation "Mobile Dry Force" or any confusingly similar designation set forth the approximate dollar amount of Applicant's annual sales of such goods or services since adopting the designation "Mobile Dry Force".
20. State the first date on which and the manner in which Applicant became aware of Opposer's use of its service marks, trademarks, trade name, or the designation DRY



FORCE, and identify each person connected or associated with Applicant who first learned of such use.

21. State whether Applicant or any person acting for or on behalf of Applicant has received any communication, oral or in writing, from any person which suggests, implies, or infers that Applicant may be connected or associated with Opposer or any other corporation, or which comprises any inquiry as to whether there is or may be or which evidences any such connection or association.

22. Identify any instance or occurrence in which any person was actually confused between Opposer and Applicant or their services or goods due to their use of their service marks, trademarks, trade name, or the designation DRY FORCE, and describe with specificity each such instance or occurrence.

23. Identify the trade channels through which Applicant has sold or is planning to offer and sell goods or services under the designation "Mobile Dry Force" or any confusingly similar designation.

24. State whether Applicant or any person acting for or on its behalf has conducted any type of inquiry or investigation of Opposer or its adoption, use, or registration of its service marks, trademarks, trade name, or the designation DRY FORCE, and if so state the date the inquiry or investigation was conducted; identify each person who conducted and reviewed it; and state with specificity the findings that were made.

25. State whether Applicant or any person acting for or on its behalf has obtained any statements or opinions regarding any of the issues in this proceeding, and if so identify the person or persons who rendered each statement or opinion and the person who obtained or received each statement or opinion, and state whether it was oral or in writing.

26. State whether Applicant or any person acting for or on behalf of Applicant has consulted with or retained the services of any expert with respect to any of the issues involved in this proceeding, and if so, identify each such expert, identify all documents upon

which the expert will base her expert opinion, and describe the subject matter concerning which she was consulted or retained.

27. Identify the witnesses Applicant intends to call to testify on its behalf in connection with this proceeding and state the facts or subject matter concerning which they are each expected to testify.

28. Identify the documents upon which Applicant intends to rely in connection with this proceeding.

29. Identify all documents in the possession, custody or control of Applicant including but not limited to search reports, market surveys, interoffice memoranda, etc. referring or relating to the adoption of the term "Mobile Dry Force" for each product and/or service specified in Class 037 of application Serial No. 77/399,957.

30. State whether Applicant is aware of any past or present third-party uses or registrations of the designation "MOBILE DRY FORCE" and/or DRY FORCE and/or any variations thereof with respect to any goods or services, and if so, identify each such third party and the goods or services for which the designation has been or is now used or registered.

31. Identify each person who participated in the preparation of Applicant's responses to the foregoing interrogatories or furnished any information in response thereto, and for each specify the interrogatory response for which each such person provided information or participated in the preparation of.

32. Identify all documents relating to the subject matter of the foregoing interrogatories and the preparation of Applicant's responses thereto.

33. Identify any and all documents responsive to the foregoing interrogatories, including any and all documents which are lost or unavailable and identify the date(s) the loss or unavailability was first discovered, the person(s) who first discovered the loss or

unavailability and the person(s) most knowledgeable about the contents of such lost or unavailable documents.

34. Identify the person within Applicant's organization who has the greatest knowledge as to the information requested in each of the above interrogatories.

RESPECTFULLY SUBMITTED this 14 day of April, 2009.



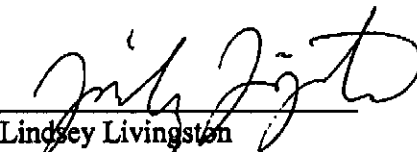
TYLER R. GOUCHER  
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*Attorneys for Applicant*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14 day of April 2009, a true and correct copy of the foregoing  
OPPOSER'S FIRST SET OF INTERROGATORIES was served by the following method(s) on  
the person(s) indicated below:

DOUGLAS W. SPRINKLE JULIE A. GREENBERG GIFFORD KRASS ET AL. PO BOX 7021 TROY, MI 48007-7021	<u>  ✓  </u> US Mail, Postage Prepaid <u>      </u> Facsimile <u>      </u> Hand-Delivery <u>      </u> Federal Express
---	--

DATED and SIGNED this 14 day of April 2009.

  
\_\_\_\_\_  
Lindsey Livingston

## Exhibit “D”

# KUNZLER & MCKENZIE

Brian C. Kunzler  
David J. McKenzie  
Bruce R. Needham  
Bryan J. Massey\*  
Tyler R. Goucher  
Tyler S. Nield  
Richard B. Nordgren  
Alec J. McGinn  
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Daniel A. Hopkinson  
Ronald N. Hilton  
REGISTERED PATENT AGENTS

Scott C. Hilton  
Robert Branham  
TECHNICAL CONSULTANTS

Scott D. Thorpe  
OF COUNSEL

\*Also admitted in Oregon

June 10, 2009

Julie A. Greenberg  
Gifford, Krass, Sprinkle,  
Anderson & Citowski, P.C.  
2701 Troy Center Drive, Suite 330  
Troy, Michigan 7021

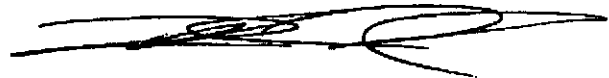
Re: Dry Force, Inc. v. Mobile Air, Inc.  
Opposition No. 9118634  
Our File 2504.7.2

Dear Ms. Greenberg,

On March 14, 2009 we sent discovery requests including a First Set of Interrogatories and a First Request for Production of Documents. When we spoke last you told me that you would look into the delay. I have followed up with several calls to your office. As of today, June 10, 2009, nearly two months after we sent the discovery requests we still do not have any discovery. If we have not received the requested discovery by Monday June 15, 2009 we will be forced to file a motion to compel.

Additionally, because discovery closes July 1, 2009, we will clearly need to extend the close of discovery along with the remaining dates in the scheduling order. We propose a two month extension on all remaining dates in the scheduling order. Please let me know how you would like to proceed.

Cordially,



Tyler R. Goucher

Exhibit “E”

## **Tyler Goucher**

---

**From:** Tyler Goucher  
**Sent:** Wednesday, June 10, 2009 4:02 PM  
**To:** 'jgreenberg@patlaw.com'  
**Cc:** David McKenzie  
**Subject:** Dry Force Inc. v. Mobile Air Inc.  
**Attachments:** Letter to Opposing Counsel Re Lack of Discovery.pdf  
  
**Importance:** High

Dear Ms. Greenberg,

Please find attached a copy of a letter I sent today. As discussed in the letter, we sent discovery requests including Interrogatories and Requests for Production of Documents on March 14, 2009. As of today, we have not received a response to these requests. If we have not received the requested discovery by Monday June 15, 2009 we will be forced to file a motion to compel.

Additionally, because the close of discovery is July 1, 2009 and we haven't received a response to our discovery requests, we will likely need to stipulate to a continuation to give us time to review the responses and follow up if necessary. Please let me know if you can respond to the discovery requests by June 15, 2009 so that I can plan accordingly.

Thank you,

Tyler R. Goucher

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**Tracking:**